IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No.

SOL ANDREWS, ET AL.,
Petitioners,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinions of the Courts Below.

The trial court filed no opinion. The opinion of the Circuit Court of Appeals, before Justices Evans, Minton and Major, as written by Mr. Justice Minton (R. 63), is appended and is not yet reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on November 15, 1941 (R. 62). Petitioner filed a petition for rehearing which was denied January 12, 1942 (R. 70). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, 28 U. S. C. A., section 347 (a).

The specific claims advanced and rulings made in the lower court which are relied upon as the basis of the jurisdiction of this Honorable Court, with page references to the printed record, have been respectfully set out in our petition.

STATEMENT OF THE CASE.

Reference is respectfully made to the "Summary Statement of the Matter Involved" in our petition (herein p. 2).

ERRORS TO BE URGED.

Reference is respectfully made to our petition under heading (herein pp. 8-9).

QUESTIONS PRESENTED.

Do the United States Courts Have Jurisdiction to Try the Issues Involved?

1. Is each case filed in the District Court, a true class action, so there may be an aggregation of the total common interests of the plaintiff and all whom he represents, in the surplus?

a. Do the members of a mutual insurance company have a common and undivided interest in the surplus?

b. Where the plaintiffs and those whom they represent have a common and undivided interest in that portion of the fund sought to be distributed, is it enough that their interests collectively equal the jurisdictional amount?

2. Do the members of mutual life insurance companies have no rights in the assets of the companies (more specifically "surplus") other than those expressed in the policy?

3. What is a mutual life insurance company?

a. Are members of mutual life insurance companies entitled to insurance at cost?

b. To whom do the assets of mutual insurance companies belong?

c. Are members of mutual insurance companies entitled to share in the profits or surplus?

d. When may members of mutual life insurance companies participate in the surplus or profits?

e. Do the proportions of undistributed surplus funds belonging to retiring members of mutual life insurance companies and which were withheld from them without their knowledge or consent constitute a constructive trust?

4. Would the granting of relief to the plaintiffs and those whom they represent interfere with the internal management of foreign corporations?

5. Would the granting of relief to the plaintiffs and those whom they represent adversely affect the rights of present members of the defendants?

6. Are plaintiffs' claims barred by the Statute of Limitations?

PROPOSITIONS OF LAW RELIED ON.

A.

Each case filed in the District Court is a true class action so that there may be an aggregation of the total common interests, in surplus, of the petitioner and all whom he represents.

(1) Members of a mutual insurance company have a common and undivided interest in the surplus.

Union Insurance Company v. *Hoge*, 21 How. (U. S.) 35, 16 L. ed. 61, 67.

Mygatt v. *New York Protection Insurance Co.*, 21 N. Y. 52, 68.

Schimpf v. *Lehigh Valley Mutual Insurance Co.*, 86 Pa. 373, 376.

(2) Where the petitioner and those whom they represent have a common and undivided interest in that portion of the fund sought to be distributed, it is enough that their interests collectively equal the jurisdictional amount.

Pinel v. *Pinel*, 240 U. S. 594, 596.

Clay v. *Field*, 138 U. S. 464, 479.

Lion Bonding Surety Company v. *Karatz*, 262 U. S. 77, 86.

B.

Members of mutual life insurance companies are not limited in their rights in surplus to the provisions on the face of the policy.

Huber v. *Martin*, 127 Wis. 412.

Korn v. *Mutual Insurance, etc.*, 6 Cranch (U. S.) 192, 3 L. ed. 195.

Carlton v. *Southern Mutual Insurance Company*, 72 Ga. 371.

May on Insurance (3rd Ed.) (1891), Sec. 548 and cases cited.

Couch Cyclopedia of Insurance Law, Vol. I (1929), Secs. 40, 234 and cases cited.

Cooley on Insurance, 2nd Ed. (1927), Vol. I, p. 68.

C.

A mutual insurance company partakes of the nature of a partnership, and each member is at the same time INSURER and insured.

Carlton v. *Southern Mutual Insurance Co.*, 72 Ga. 371, 395, 396.

Given v. *Rettew*, 162 Pa. 638, 640.

Korn, et al. v. *Mutual Assurance Society, etc.*, 6 Cranch (U. S.) 192, 3 L. ed. 195, 198.

Krugh v. *The Lycoming Fire Insurance Co.*, 77 Pa. 15, 19.

Mygatt v. *New York Protection Insurance Co.*, 21 N. Y. 52, 64.

D.

A mutual insurance company is one wherein the mutual responsibility of the members is substituted for capital so that the price to be paid for any particular insurance should be determined by the losses and expenses actually occurring during the period of the insurance.

May on Insurance (4th Ed.), Vol. 2, Sec. 548.
Savage v. *Medbury*, 19 N. Y. 32, 34.
Rhine v. *New York Life Insurance Co.*, 248 App. Div. (N. Y.) 120, 123.

(1) The theory of mutual insurance is that the premiums paid by each member for the insurance constitute a common fund devoted to the payment of any losses that may occur.

Union Insurance Co. v. *Hoge*, 21 How. (U. S.) 35, 16 L. ed. 61, 67.
Mygatt v. *New York Protection Insurance Co.*, 21 N. Y. 52, 68.

E.

All the assets of a mutual insurance company, including the surplus, belong to the members, although the legal title thereto is vested in the corporate entity.

Berry v. *Fire Insurance Company*, 94 Ia. 135, 140.
Carlton v. *Southern Mutual Insurance Co.*, 72 Ga. 371, 402.

F.

Any funds accumulated by a mutual insurance company in excess of its losses and expenses constitutes a surplus, and the members are entitled to share therein.

Carlton v. *Southern Mutual Insurance Co.*, 72 Ga. 371, 397, 400, 402, 403.

White v. *Provident Life and Trust Co.*, 237 Pa. 375, 385.

Rhine v. *New York Life Insurance Co.*, 248 App. Div. 120, 123.

Given v. *Rettew*, 162 Pa. 638, 640.

Schimpf v. *Lehigh Valley Mutual Insurance Co.*, 86 Pa. 373, 376.

G.

Where a mutual company has a surplus in the treasury made up of the proceeds of cash payments by members and the interest upon the investment thereof, all the members who contributed to such surplus are entitled to share in it in proportion to the amount of their respective payments, whether they are policyholders at the time of the distribution or not.

Carlton v. *Southern Mutual Insurance Company*, 72 Ga. 371, 403, 405.

Smith v. *Hunterdon County Mutual Fire Insurance Company*, 41 N. J. E. 473.

H.

The proportions of the surplus funds belonging to the retiring members and which were withheld from them without their knowledge or consent constitute a constructive trust.

Catherwood v. *Morris*, 345 Ill. 617, 632, 633.

Motometer, etc. v. *National Gauge, etc.*, 31 Fed. (2nd) 994.

Prosser v. *Finn*, 208 U. S. 67, 52 L. ed. 392.

I.

To grant relief to petitioners and those whom they represent would not interfere with the internal management of foreign corporations, and would in no way interfere with, or involve the exercise either past or future of, any discretion by their directors.

Castagnino v. *Mutual Reserve Fund Life Association*, 157 Fed. 29, 32, 33.

Pierce v. *Equitable Life, etc.*, 145 Mass. 56, 59, 60, 61, 63.

White v. *Provident Life*, 237 Pa. 375, 385.

Carlton v. *Southern Mutual, etc.*, 72 Ga. 371, 406.

Townsend v. *Equitable Life*, 263 Ill. 432.

Frick v. *Hartford Life Insurance Co.*, 179 Ia. 149, 167, 168.

Peters v. *Equitable Life, etc.*, 196 Mass. 143, 148.

(1) **Upon the termination of membership in a mutual insurance company, the rights and liabilities of members become fixed and cannot involve the exercise of discretion by the directors of the company.**

Castagnino v. *Mutual Reserve Fund Life Association*, 157 Fed. 29, 32, 33.

Townsend v. *Equitable Life*, 263 Ill. 432.

Frick v. *Hartford Life Insurance Co.*, 179 Ia. 149.

Carlton v. *Southern Mutual, etc.*, 72 Ga. 371, 406.

Raegener v. *Willard*, 44 App. Div. (N. Y.) 41, 42.

(2) **A suit for an accounting and a determination of the rights of retired members in a mutual insurance company may be brought in Courts other than that of the domicile of the said mutual company.**

Peters v. *Equitable Life*, 196 Mass. 143, 148.

Pierce v. *Equitable Life*, 145 Mass. 56, 59, 60, 61, 63.

Castagnino v. *Mutual Reserve Fund Life Association*, 157 Fed. 29, 32, 33.

J.

To grant petitioners relief would in no way affect adversely the rights and interests of continuing-members of the defendants.

White v. *Provident Life, etc.*, 237 Pa. 375, 381.

K.

Convenience, efficiency and justice do not require that this Court decline to take jurisdiction of suits of this character.

Peters v. *Equitable Life*, 196 Mass. 143, 150.
Pierce v. *Equitable Life*, 145 Mass. 56, 62.
Frick v. *Hartford Life Insurance Co.*, 179 Ia. 149, 166, 167, 168.

L.

Petitioners' claims are not barred by the Statute of Limitations.

See Argument.

ARGUMENT.

(All emphasis ours)

A. Each case filed in the District Court is a true class action so that there may be an aggregation of the total common interests, in surplus, of the petitioner and all whom he represents.

Rule 23 of the Rules of Civil Procedure for District Courts of the United States, which is entitled "Class Actions", provides as follows:

> (a) Representation. "If persons constituting a class are so numerous as to make it impracticable to bring them before the Court, each of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is
>
> (1) "*Joint, or common,* * * *.*"

This rule is an embodiment of the principle announced by the United States Supreme Court in many cases, several of which are discussed in the following pages.

(1) Members of a mutual insurance company have a common and undivided interest in the surplus.

In the case of *Union Insurance Company* v. *Hoge*, 21 How. (U. S.) 35, 16 L. ed. 61, the Court said at page 67:

> "* * * The theory of a mutual insurance company is that the premiums paid by each member for the insurance of his property constitue a *common fund*, devoted to any losses that may occur. * * * "

The identical language was used in *Mygatt* v. *New York Protection Insurance Company*, 21 N. Y. 52, at page 68.

So also in *Schimpf* v. *Lehigh Valley Mutual Insurance Company*, 86 Pa. 373, the Court, at page 376, said:

> "The true principle of mutual insurance is the payment of each of the insured of a certain sum of money towards a *common fund*, which fund is to be held for the protection of each person so contributing."

That the surplus funds are common funds was not denied by the defendants in cases No. 938, 939, 941, 951 and 1016, for there appeared on page 16 of the brief filed in the lower Court a reference to the surpluses as follows:

> "One general fund *created by all* of the policyholders * * *. The rights of the policyholders in the same *common fund* * * *."

In these cases the respondents did not raise the question of jurisdictional amount because they must have realized that to do so would create an incongruity wherein, on the one hand, they would be admitting that there is a common fund and that under the charters the petitioners and those whom they represent would have common and undivided interests therein; while, on the other hand, they would be forced to take the position of the other respondents and claim that the petitioners and those whom they represent have separate and distinct demands based upon the different contracts and separate rights.

(2) Where the petitioners and those whom they represent have a common and undivided interest in that portion of the fund sought to be distributed, it is enough that their interests collectively equal the jurisdictional amount.

The question of whether or not the jurisdictional requirement of $3,000.00 exclusive of interest and costs has been met is one of the issues raised by some of the respondents. In their briefs filed in the District Court they have placed a construction upon the interests of the

petitioners and those whom they represent in the surpluses as being entirely separate and distinct from each other and having no common interest therein. They have all relied upon *Eberhard* v. *The Northwestern Mutual Life Insurance Company,* 241 Fed. 353, and have cited that case as a leading case for the rules which were announced therein. The general proposition has been stated in the case of *Pinel* v. *Pinel,* 240 U. S. 594, at page 596, as follows:

> " * * * when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

The rule was also stated in the case of *Clay* v. *Field,* 138 U. S. 464, at page 479, as follows:

> "The general principle observed in all is, that if several persons be joined in a suit in equity or admiralty, *and have a common and undivided interest, though separable as between themselves,* the amount of their joint claim or liability will be the test of jurisdiction * * *."

In the brief filed in the District Court by the defendant in the case of *Shockley* v. *Mutual Life Insurance Company,* the defendant admitted that:

> "When a plaintiff prosecutes a right which he derivatively holds or holds in common or jointly with others, the concept of totality is inherent with the claim or right involved."

Where the interests of the petitioners and those whom they represent are common and undivided, it would be impossible to effect the determination of the interest of one without necessarily having to determine the interests of all those who contributed to the fund. How can any other construction be placed upon the situation where all members have contributed to a fund which was employed

jointly for the benefit of all by the investment and reinvestment thereof? It is not to be misunderstood, however that the present suits claim or contemplate the division of the entire surplus for we agree that as to the continuing policyholders and their interests in the surpluses the directors may yet exercise a discretionary power in the management and retention thereof.

We feel that a complete discussion of the *Eberhard* case will clarify the issue on the question of jurisdictional amount, and there will be ample demonstration that not only are the interests of the petitioner and those whom he represents in each of the cases common and undivided, though separable as between themselves, but that the suits must of necessity be true class actions.

Let us therefore, consider the case of *Eberhard* v. *The Northwestern Mutual Life Insurance Company,* 241 Fed. 353. In that case, three complainants, holding semi-tontine policies, filed suits based upon the insurance contract or policy. No representation was made to the Court by either the plaintiffs or the defendant in that case that there was a dual relationship, to-wit, that of insurer and insured. In that case the Court did not consider the relationship of insurer so far as the plaintiffs were concerned, but considered the rights under the policy, and for that reason stated at page 355:

> "It cannot be doubted that such rights as each policyholder has depended upon his contract with the insurance company and are measured by its terms. The *policy is an agreement to pay its holders a computable sum of money upon certain conditions.* His interest (under the policy) does not depend upon, and is not related to, the interest of any other policyholder similarly situated." (Parenthesis ours.)

The Court continued still considering the rights as the insured under the policies:

> "True, there is some relation between the total number of qualified policyholders and the amount each will receive, but this mutual relationship is remote from that common interest which requires the claims of all to be jointly litigated, in order to ascertain the particular sum to which anyone is entitled. The rights of the policyholders (as insureds) are not derived from the same, or a common, title. The right each has in the fund is based upon the separate, distinct contract each has with the company with respect thereto." (Parenthesis ours.)

The *Eberhard* case cites the case of *Clay* v. *Field*, 138 U. S. 464, wherein the test to be applied was announced. We refer the Court to our quotation from that case as well as the quotation from *Pinel* v. *Pinel*, 240 U. S. 594.

The defendants in cases Nos. 957, 958, 965 and 1030 in the court below relied as well upon *Lion Bonding and Surety Company* v. *Karatz*, 262 U. S. 77, which was a case that concerned itself exclusively with a suit by an individual creditor of an insolvent company who could not claim in any way, shape or form an undivided, common or joint interest in the fund together with any other creditors of the same.

In that case, the Court rightly held that, as a federal court, the District Court was without jurisdiction in view of the fact that Plaintiff's claim against the company was less than $3,000.00 for the reason that the case was not of that class where the amount in controversy is measured by the value of the property involved in the litigation and the Court said, at page 86:

> "*Nor is it like those cases in which several plaintiffs, having a common, undivided interest, unite to enforce a single title or right, and in which it is enough that their interests collectively equal the jurisdictional amount.*"

In the same cases, counsel for those defendants relied upon *Woods* v. *Thompson,* 14 Fed. (2nd) 951, which has no original force but based its opinion on the reasons of the cited case of *Robbins* v. *Western Automobile Insurance Company,* 4 Fed. (2nd) 249, which in turn had no original force for the reason that in that case the Court based its decision upon the *Karatz* and *Eberhard* cases. We refer the Court, therefore, to our discussion of the *Karatz* and *Eberhard* cases appearing above.

Under the cases cited, even though the legal title is in the corporate entity for the purpose of convenience of administration, it cannot be denied that, the fund being invested and administered by the corporate entity as a common fund and not as separate, allocable funds belonging to any individual member or members, each member's right is undivided, common and joint with the rights of the other members whose memberships were co-existent with his own, and that the concept of totality must be inherent; for each of them has an undivided proportionate interest in all of the surplus. To put it another way, the petitioners' interests as insurers were undivided, common and joint with those of all other co-existent members, while the extent of their participation could be determined not by reference to the face amount of the policies nor to any provision therein contained, but only by reference to the amounts contributed and the duration of the memberships.

Were petitioners to be understood as basing their rights upon their insurance policies, that is to say upon the relationship between them, as insureds, and the corporate entity, it would be apparent that the respondents' contentions in this regard might be well taken, but this is not the case. We must keep in mind at all times that the basis of the cases before the Court is in all of them the rela-

tionship created between all the members of the respective respondent companies as insurers, wherein the members have undivided, common, equitable interests in the surplus or profits.

While it is true that the interests of the petitioners and those of the other former members of the respondent companies may be separable as between themselves, when determined, nevertheless their interests in the fund are common and undivided. The allegations contained in paragraph 6 of the Second Amended Complaint (Rec. pp. 5-7) admittedly true by the motions to strike, demonstrate that in the light of the law quoted from the cases (our brief pp. 13 to 15) there was a relationship between all former members whose memberships were co-existent, whether from beginning to end or during overlapping periods of time, by which their interests were common and undivided.

Certainly, it is apparent that with the commingling of all of the former members' funds (Rec. pp. 6-7) such a community of interest exists that even by the wildest stretch of the imagination one could not separate the component parts of the surplus funds so as to distinguish the particular funds of each individual person therein from that of the others.

B. Members of mutual life insurance companies are not limited in their rights in surplus to provisions on face of policies.

The only question with which the Circuit Court of Appeals concerned itself in rendering its decision was that of jurisdiction. The Court found that the rights of members in a mutual insurance company are limited to the terms of the policy contract and come from it alone; that if a member depends upon anything but his rights under the contract contained in the policy, he "depends upon something that does not exist".

The Court, therefore, found that since in its opinion there were no rights outside the policy, the rights of members under their policies were several and individual and did not constitute such rights as could be aggregated to make the jurisdictional amount.

The Court found, however, that if the claims of the petitioners and the persons he purports to represent were joint, they might be aggregated to make the jurisdictional amount, and the size of the fund then may control.

A thorough examination of the policy and application attached to the complaint (Rec. pp. 12 to 33) fails to disclose any reference to membership in the company, yet there can be no serious denial made that a policyholder becomes a member of the company upon becoming insured therein, even though no mention is made thereof in the policy or application, or the rights of membership are not delineated in the policy.

Since the policy or application does not mention membership, if it is to be held that all rights are limited to the policy, what becomes of the charter provisions with reference to membership? We respectfully urge that to find that "If the plaintiff depends upon anything but his rights under the contract contained in the policy, he depends upon something that does not exist," is tantamount to saying mutual companies do not have members.

By the decision rendered in this matter by the Circuit Court, the Court found that no dual relationship exists between members of a mutual company, to-wit: that of insurer and insured, but that there was only a single relationship created, to-wit: that of insured or debtor-creditor relationship. This dual relationship has been emphasized by the three foremost authorities on insurance, to-wit: *May on Insurance, Couch on Insurance* and *Cooley on Insurance.*

May on Insurance, Section 548, 3rd edition (1891) said:

> "The principle of mutual insurance is * * * he is at once insurer and insured * * * The principle of mutuality was said to consist * * * in the fact that he (the member) contributes to the common fund. * * * ". (Parentheses ours.)

and cited the cases of *Mygatt* v. *N. Y. Protection Ins. Co.*, 21 N. Y. 52, *Ohio Mutual Ins. Co.* v. *Marietta*, 3 Ohio St. (n. s.) 348.

Couch in his *Cyclopedia of Insurance Law, Volume I* (1929), which respondents have relied upon, in the Court below, said at Section 40:

> " * * * Mutual insurance, as its name implies, exists where several persons have joined together * * * the relationship between the members being a dual one, in that each member is both an insured and an insurer, it being an essential element of mutual insurance that the insured and the insurer be identical, and the society or association being conducted, not for profit, but for the sole benefit of its members and their beneficiaries * * * ".

Again, in Section 234, *Couch* discussed the dual relationship, to-wit: that of insured and of insurer; and in Section 239 he said that the equitable interest in the property belongs to the members, and continued in the same section:

> " * * * so, it is held that a policy holder in a mutual life insurance company has a quasi ownership in its assets * * * and the books of a mutual insurance company are in law as much the property of one certificate holder (policyholder or member) as of another. But the holders of certificates are not creditors within the meaning of a statute relative to proceedings in equity against corporation;" (Parentheses ours),

and cites *Hill* v. *Nautilus Ins. Co.*, 4 Sandf. Ch. (N. Y.) 577.

In the case of *Huber* v. *Martin*, 127 Wis. 412, greatly relied on by defendants in the court below, wherein *Marshall, J.*, who rendered the opinion of the Court, also wrote the *syllabus* preceding the decision, stated:

> "The interests of policyholders in a mutual insurance company are two-fold, they are both insurers and insured".

The question of whether or not members have any interest in the assets of a mutual company save those expressed on the face of the policy, was decided in the same case, and that portion of the Court's decision relating thereto is quoted, as follows:

> "False notions of this matter, which may be, perhaps, attributed in part to courts, has led to the erroneous idea that the members of a mutual insurance company have no rights save those expressed on the face of their policy; * * *. That is a very erroneous and dangerous doctrine. Nothing will be more productive of good administration of such concerns as the one under discussion than to have it definitely proclaimed by the courts, as we do know that, while the corporate property belongs to the corporation for corporate purposes, the corporation itself belongs to the members thereof, * * * to prevent wrongs of a serious nature from going without redress."

While we have discussed *Cooley on Insurance* and he has been cited as an authority by the respondents, we feel that the Court will find some clarification in reviewing, in a little greater detail, what *Cooley* has said concerning this subject matter, 2nd Ed. (1927), Volume 1, at page 68:

> "The members and stockholders of a mutual insurance company are, therefore, identically the same. That is to say, a stockholder of a mutual insurance company is simply one who has paid into the capital of the company by way of premiums, and who is responsible for its losses to that extent, and *who is en-*

titled, when such premiums shall have accumulated to a larger sum than is required to pay the losses, to pro rata division thereof as profits.

"It is clear, therefore, that the members of mutual insurance companies sustain a double relation, in that they are insurers and the parties insured; for it is the whole membership of a mutual company which contracts to indemnify each of the members with respect to the loss insured against." (*Lehigh Valley Fire Ins. Co.* v. *Shimpf*, 13 Phila. (Pa.) 515.)

And again at page 154:

"In the case of mutual companies, the relation of the policyholder is a dual one. Each policyholder of a mutual company is at the same time insurer and insured. In one aspect he is a mere holder of a policy, containing a contract of indemnity • • •. In another aspect, *he is a member of the corporation, and, as such, his rights and liabilities are defined partly by the contract contained in the policy, partly by the statutes and partly by the by-laws of the corporation.* (*Commissioner* v. *Mass. Mut. Fire Ins. Co.*, 112 Mass. 116.) He does not stand in relation of a corporator in his own act of insurance, but as to this he is a stranger • • •."

It will be observed that all of the authorities on this subject, without exception, are in accord that the rights of members of a mutual insurance company are *not* limited to the terms of the insurance policy.

We respectfully submit that to hold otherwise would be holding in effect that there is no distinction between a stock company and a mutual company.

The charters of the defendants further illustrate our point.

In the charter of the Metropolitan Life we find the following:

"The Board of Directors may purchase * * * any claims of policyholders for *profits.*" (R. 35).

This indicates that the charter did not contemplate that the members were limited in their interest in surplus only to the dividends declared and received by them.

In the charter of the New York Life company we find the following:

"* * * the officers * * * shall well and truly ascertain the surplus earned by it during said year, * * *" (R. 36).

In the charter of the Mutual Life of New York we find the following:

"* * * Each member shall be credited with the amount of said premium, and also with an equal share of the profits of the said company derived from investments and earnings in proportion to said amount, * * *" (R. 36).

In the charter of the National Life company we find the following:

"All said business to be done upon the principle of mutual participation in the funds or profits and mutual distribution or otherwise." (R. 37).

Thus it can be seen that the intention of the charters of the respondents not only failed to limit or effect a forfeiture of interest in surplus, but positively directed and provided that that be done which we have shown should be done in equity and good conscience.

The Circuit Court, in the present case, cited, in support of their holding and there is no relationship other than that of debtor and creditor, the cases of *Equitable Life* v. *Brown*, 213 U. S. 25; *Greeff* v. *Equitable Life*, 160 N. Y. 19, and *Grobe* v. *Erie County Mutual*. We call attention to the fact that in the *Brown* and *Greeff* cases, *suits based upon policies* were brought by policyholders against

a stock company. In the *Grobe* case, the suit was brought in an attempt to prevent a mutual company from being reorganized as a stock company, which is not a case comparable to the instant case; and even in that case, the Court indicated that the members of a mutual insurance company had a common, undivided and joint interest in the assets of the company other than that delineated by the policies by stating that

> "No member has any interest in any aliquot part thereof and the *unascertained interest* of a mere policyholder is quite insufficient to sustain an equitable action brought to prevent a corporation from doing what the statute anthorizes it to do • • • ".

In the *Grobe* case, the members of a mutual company would not have been prejudiced and were not prejudiced by the change from a mutual to a stock company because the members of the mutual company would have received stock in return and thus their equitable interest would have been transferred to an ownership of stock in a stock company. We submit that the *Grobe* case did not hold that a policyholder was limited to his rights under his policy.

We respectfully urge that the equitable rights of members of a mutual insurance company do not stem from the policy contract, which merely covers the insured aspect of membership, but arise from the character of the company, and stem from the charter. We refer the Court, again, to a review of the decision cited at page 39, wherein the following was stated:

> " • • • and the State also contracts, by the charter, with the entity for the benefit of all who may become members of it".

We must respectfully urge that the Circuit Court misapplied the law involved in all of the cases cited in its opinion, since all of the cases were suits upon policies, except

the *Woods* case, and were not brought to adjudicate any rights other than those that arose from claims under the policies alone. It is obvious that this can have no application to the issue in the instant case, which involves that broader aspect of participation in the business of a mutual insurance company as *insurer*, whereby the member substitutes mutual responsibility in lieu of capital investment for stock. The Circuit Court dismissed such membership rights by finding that they are "something that does not exist".

The *Eberhard* case was a suit based upon a policy and the rights arising out of the terms thereof (See pp. 24-25).

The case of *Robbins* v. *Western Automobile Ins. Co.* was a suit "to enforce their claims *arising out of insurance policies* issued".

In the case of *Woods v. Thompson*, cited by the Circuit Court, it was obvious from the language of the Court that the decision had no original force nor was it intended by the Court to have any. This is readily demonstrated by what the Court said at page 52, and we quote:

> "Neither of these contentions (that the amount of the fund controls) can stand in the light of the case of *Robbins* v. *Western Automobile Ins. Co.*, 4 F. (2nd) 249, decided by this Court, and the cases cited and relied on in that case, *Lyon Bonding Co.* v. *Karatz, Supra*, and *Eberhard* v. *Northwestern Mutual Life Ins. Co.*, 241 Fed. 353." (Parentheses ours.)

The Circuit Court, in the present case, recognized that the *Eberhard* and *Robbins* cases were suits on policies. The *Karatz* case was, as we point out in our brief (p. 25), a suit by creditors between whom there was no relationship at all. The fact that the *Woods* case had no original force is further demonstrated by the following language of the Court:

"Every contention as to the aggregation of the several claims, and as to the amount of the trust fund determining the amount in controversy, is concluded by these decisions, and nothing would be gained by repeating the reasons and conclusions stated in them."

A further consideration of the record and briefs filed in the *Woods* case demonstrates that the two suits in said case were not brought by former policyholders of the Illinois Bankers Life Association as the Circuit Court noted in its opinion, for at pages 3 and 4 of the bound volume of the record and briefs in that case, the complaint contains the following allegations:

"Second: That the Plaintiffs are the owners and holders of contracts of insurance wherein and whereby they are the *insured* • • •

"Third: That all of said contracts of insurance are duly executed • • • ; that all of said contracts of insurance *are in full force and effect* • • • ".

The *Woods* case was similar to the *Grobe* case in that a mutual company was sought to be restrained from being converted into a stock company. In the *Woods* case evidence was heard on the prayer for injunctive relief, and that suit was not brought as a class action. In fact, one of the points raised by the defendants was that policyholders whose proxies were involved were indispensable parties to both bills. In the *Woods* case, the plaintiffs desired to recover nothing; they sought merely an injunction. No attempt was made by plaintiffs to recover funds. No cases were cited in support of a dual relation, nor was any mention whatever made of a dual relation in a mutual company such as has been done at considerable length by the plaintiffs in the present case.

It is apparent then that none of the cases cited by the Circuit Court, in its opinion, apply to the instant case.

The *Eberhard* case was a suit on a policy. The *Robbins* case was a suit on a policy. The *Karatz* case was a suit by independent creditors not related to each other as such. And finally the *Woods* case, expressly depending upon and decided in the light of the *Robbins, Eberhard* and *Karatz* cases, had no original force, and, as has been pointed out, is so dissimilar to the case at bar as not to be applicable. Furthermore, all said cases involved then present policyholders.

Significance must be attached to the numerous decisions which hold that:

> "* * * The theory of a mutual insurance company is that the premium paid by each member for the insurance of his property constitute a common fund, devoted to any losses that may occur * * *."

We respectfully urge that the subject matter herein involved is definitely that of joint, common and undivided interest and falls clearly within the application of Rule 23.

Petitioners, therefore, respectfully urge that:

(1) their rights are not limited to the policies of insurance,

(2) the members have a joint, common and undivided equitable interest in the assets of the company arising by virtue of their membership therein,

(3) the amount of the fund involved controls the jurisdictional amount because of the joint, common and undivided interest of the members therein,

(4) that the fund exceeds the jurisdictional amount.

What Is a Mutual Life Insurance Company?

The basis of the suits filed in the District Court revolves around the true nature or interpretation of a mutual insurance company. That it is not a partnership in its proper or legal sense is conceded. That it partakes of the nature of a partnership, and that there are sufficient attributes of an equitable limited partnership sufficient to sustain the action and the jurisdiction of the Court is most strongly urged. We shall trace the history of the definition, by the Courts, of a mutual insurance company to show how, from as early as 1810 through as late as 1936, the character and attributes of a mutual insurance company have not been modified or changed either by statutory enactment or by judicial interpretation.

The petitioners brought their representative actions to enforce their rights as former members of mutual insurance companies, exclusively. They did not base their actions upon their policies, although copies of their policies were attached to their second amended complaints as exhibits for the purpose of establishing evidence of their memberships in the various companies.

The theory of petitioners' cases is that in mutual insurance companies the assets of the companies, including the surpluses, are held by the companies for the benefit of all the members; and that all of the members are entitled to participate in the profits of the companies, which accured during the terms of their memberships in proportion to their contributions to the companies in the form of premiums; that participation in the profits of the companies is the right of all members by virtue of their relationship in the companies as insurers in addition to and distinct from any benefits which any individual member might be entitled to receive by virtue of the policy or contract of insurance as an insured; that

there is a dual relationship, in a mutual insurance company, wherein the members are at the same time both insureds and insurers; that as insurers they are entitled to be credited with that portion of the surplus, if any, remaining after deducting all reserves for all liabilities according to law and the cost of operation, which accrued during their memberships, in proportion to their contributions; that upon the termination of their memberships in the said companies, members are entitled to receive their proportionate shares of the surpluses which accumulated during the terms of their memberships and which were not distributed by the companies to them in the form of dividends.

C. A mutual life insurance company partakes of the nature of a partnership, and each member is at the same time INSURER and insured.

As early as 1810, in the case of *Korn, et al.* v. *Mutual Assurance Society, etc.*, 6 Cranch (U. S.) 192, 3 L. ed. 195, the Court said at page 198:

> "Every member, in fact, stands in the peculiar situation of being party of both sides, *insurer* and insured."

The relationship between the members of a mutual insurance company was very thoroughly and ably discussed in the case of *Carlton* v. *Southern Mutual Insurance Company*, 72 Ga. 371, wherein the Court said at page 395:

> "The necessary deduction from this legal principle (that the general law of partnerships applied to mutual insurance companies) *incorporated into our code* is, that, except insofar as changed by the charter, the general law of partnership, as to profit and loss, governs a mutual insurance company just as the general law of partnership as to profit and loss, governs all partnerships inter sese, unless changed by the terms of articles of partnership." (Parenthesis ours.)

It is evident in the *Carlton* case that even though there was a statute that provided for the application of the general principles of partnership to mutual insurance companies, nevertheless, the Court recognized that in order to be "incorporated" into their code such a legal principle existed at common law.

The Court continued at the same page:

> "The charter stands in place of articles of partnership and modifies the general law as respects losses and profits * * * and, except as changed by the charter, equity will apply the general laws of partnership in respect to interests in and division of profits to the entity, which would be applied to such interests and division in the partnership, except insofar as the articles or contract between the partners have modified its application between the partnership."

The Court stated further at page 396:

> "* * * *and the state also contracts, by the charter, with the entity, for the benefit of all who may become members of it.*
>
> "Does the charter of this company annul the idea of mutuality, or does it only regulate its mode and application, and enforce it, within certain restrictions therein made? *It seems to us that it recognizes fully the idea of mutuality and makes each insured an insurer and a participant in losses and profits.*"

In the case of *Given* v. *Rettew*, 162 Pa. 638, decided in 1894, the Court on page 640 quoted from *Schimpf* v. *Insurance Company*, 86 Pa. 373, as follows:

> "Mutual insurance companies, on the other hand, are somewhat of the nature of a partnership; the insured becomes a member of the incorporation by virtue of his policy, is entitled to a share of the profits, and is responsible for the losses to the extent of his premium paid or agreed to be paid."

In the case of *Krugh* v. *The Lycoming Fire Insurance Company,* 77 Pa. 15, decided in 1874, the Court said at page 19:

> "The defendant in error is a mutual insurance company. All persons who affect insurance therein become associated together in a manner partaking of the nature of limited or special partners."

In the case of *Mygatt* v. *New York Protection Insurance Company,* 21 N. Y. 52, decided in 1860, the Court at page 61 said:

> "If the contributors of the additional fund are to participate in the profits of the business, and if the fund itself is liable as the capital stock of the company to the payment of its debts, then such contributors are to all intents and purposes partners in the company, and not its creditors."

The Court continued at page 64:

> " * * * the principles of mutual insurance require that every person insured upon that plan should be also himself an insurer; that is, that each person insured must also be an insurer of all his associates as well as insured by them * * *."

The Court also said at page 65:

> " * * * a mutual insurance company is simply a company whose fund for the payment of losses and expenses consists not of a capital subscribed or furnished by outside parties, but of premiums mutually contributed by the parties insured."

D. A mutual insurance company is one wherein the mutual responsibility of the members is substituted for capital, so that the price to be paid for any particular insurance should be determined by the losses and expenses actually occurring during the period of the insurance.

May on Insurance (4th ed.), Vol. 2, Sec. 548, says:

"The principle which lies at the foundation of mutual insurance, and gives it its name, is mutuality; in other words, the intervention of each person insured in the management of the affairs of the company, and the *participation of each member in the profits* and losses of the business, *in proportion to his interest.*"

In the District Court, counsel for two of the respondents quoted this authority. It might be well to ask at this time if all members were to bear their proportionate share of the losses, and not any less than that, would it be equitable to give them any less than their full portion of the profits or gains made while members? Of course, such right of participation could be forfeited by agreement, by statute or by charter. Even considering, for the sake of argument, the pertinent provisions of the policy exhibits (R. 12-29) for the purpose of determining whether or not there are any forfeitures of interest in surplus therein contained, that there are none is most obvious. Such portions of the charters as have been incorporated into the complaints, as amended, failed as well to disclose a limitation or forfeiture of interest of members in surplus (R. 35). And finally, a close study of the statutes of the various States of the domiciles of the respondents also fails to disclose any limitation or forfeiture in surplus, either expressly or by implication.

In the case of *Savage* v. *Medbury,* 19 N. Y. 32, the Court at pages 33 and 34 said:

"The conclusions arrived at that the essential features of that species of insurance was that the insured were themselves insurers of each other, so that each person insured would be entitled to full indemnity against loss to the amount of his insurance, *bearing only his proportion of all the losses happening on any of the risks insured against, and all the actual expenses of carrying on the business.* Different modes

> of working out this general plan had existed * * *; but they were all framed to contain, in substance, the same end, of substituting mutual responsibility for capital, either wholly or partially, and of limiting the price of insurance to the actual cost of indemnity against all risks of all the members. *It would seem a necessary part of such a plan of mutual insurance, that the price to be paid for any particular insurance should be determined by the losses and expenses actually occurring during the period of the insurance. For just insofar as that rule should be departed from, would the business cease to possess the character of mutuality,* * * *."*

So also in the case of *Rhine* v. *New York Life Insurance Company,* 248 App. Div. 120, decided in 1936, the character of a mutual company was discussed on page 123, wherein the Court said:

> "Under the mutual plan, in order to provide for unforeseen contingencies, the premium to be paid by a member is fixed by the company at an amount somewhat in excess of that which the company anticipates will be necessary to cover the cost of the insurance. The member pays that amount in advance, but later receives *such excess payment,* if any, as a dividend, and *thus gets the insurance at cost."*

The Court said further:

> *"As the policyholders in a mutual insurance company have paid in more than was necessary, they are entitled to a return of such over payments."*

This quotation amply demonstrates that the New York Court of the Appellate Division, not unmindful of the insurance statutes enacted during the period between 1859 and 1936, recognized the character of a mutual insurance company as remaining unchanged.

That the insurance statutes were not enacted to change the character of any insurance company was demonstrated in the case of *Lord* v. *Equitable,* 109 App. Div. 252, decided in 1905. At that time the *Equitable Life* was a stock company, but the Court discussed the question of amending the charter and the relationship of the statutes of New York to the character of the company, and said at page 266:

> "It seems entirely clear to us that the provisions of Section 52 of the Insurance Law did not contemplate any radical change of the character of any domestic insurance company; the Insurance Law is in fact a codification of the Insurance Law of the State as it existed at the time of the enactment, and the provisions of Section 52 are merely intended to permit companies organized under special acts, or under previously existing statutes, to come within the particular provisions of the codified law, more as a matter of convenience than as one of substance."

It is significant that while members have paid premiums in excess of the anticipated costs, there is not the slightest doubt that they are entitled to receive back, whether during their memberships or at the termination thereof, such excess payments, and also effect a reduction, retroactively, of such premium payments by a distribution to them of their proportionate interests in the gains or profits of the business which accrued during their memberships.

E. All the assets of a mutual insurance company, including the surplus, belong to the members, although the legal title thereto is vested in the corporate entity.

In the case of *Carlton* v. *Southern Mutual Insurance Company,* 72 Ga. 371, the Court said at page 402:

> "The legal title, to it (surplus) may be in the corporation, but the *true equitable title is in the contributors* to it." (Parenthesis ours.)

So also in the case of *Berry* v. *Fire Insurance Company*, 94 Ia. 135, the Court said at page 140:

> "Mutual companies have no stockholders, within the ordinary meaning of the term, *but they may have money and other property which is owned by its members* subject to the right of the company to control and use it for corporate purposes."

Unquestionably, these cases demonstrate that where originally mutual insurance companies operated as associations, the management was so cumbersome that the device of incorporation was utilized as a matter of convenience and not for the purpose of destroying the mutual character of the relationship between the members. Certainly, in a mutual company, there are none other than those who have contributed to the funds of the company who could equitably and rightfully claim that the assets belong to them.

F. Any funds accumulated by a mutual insurance company in excess of its losses and expenses constitutes a surplus and the members are entitled to share therein.

We believe that no one will take issue with the foregoing statement as being the law applicable to a mutual insurance company.

G. Where a mutual company has a surplus in the treasury made up of the proceeds of cash payments by members and the interest upon the investment thereof, all the members who contributed to such surplus are entitled to share in it in proportion to the amount of their respective payments, whether they are members at the time of the distribution or not.

This can be the only proper interpretation of the rights of members in a mutual insurance company.

In the case of *Carlton* v. *Southern Mutual Insurance Company*, 72 Ga. 371, the Court discussed the question of when must a stockholder or policyholder in a mutual company be a member in order to be permitted to participate in a division of the profits, and said, at page 397:

> "What does stockholder mean * * * and when must he be one, so as to participate in a division? * * * If he had been for ten years a stockholder and during those ten years profits had been made to amount of one half of this million of dollars, and had ceased to insure, or renew, by receipt his policy, a week before this bill was filed, does he cease to be a stockholder, in the sense of being entitled to share in what his money helped to make?"

Similarly if no dividends had been declared for ten years and a huge surplus accrued and was not distributed until a week after a member terminated his membership, should he then be held to have forfeited his interest in that which his money helped to make?

The Court, referring to the members of a mutual company, used the words "stockholder" and "policyholder" interchangeably and went on to say, at page 398:

> "Stockholder does not mean here what it does in a stock insurance company, where the owner of the stock may sell it, and another take his place by purchase."

And, at page 400, the Court said:

> "Thus we conclude, from the statute of this state and the construction of this charter, that the idea of mutuality in the statute remains in the charter, and the true construction of the charter is, that a stockholder in the company, in respect to division of profits, is he who put stock in it in the shape of premium money, and *if what he put in contributed to make a surplus fund of profits, whether in or out when the*

division is made, he remains a member to draw his share of such profits according to the amount of his premium paid, pro rated with that paid by others, who also contributed to the accumulation."

The foregoing quotation states as clearly as could be stated the general proposition upon which the petitioners rely.

The statute referred to in that case did nothing more than express the common law as it related to mutual insurance companies.

And the Court continued at page 401:

"Equity regards that done which should have been done. If the surplus over a proper reserve fund was in the coffers of the company, equity, therefore, if it appears that it should have been divided while the member was still insured and that the division would have allotted to him a part, considers the dividend declared and his part given him."

And, at page 403, the Court said:

"*Whatever was not issued to a then stockholder entitled to it, he is entitled to that now; because he has paid all his contribution to the losses while insurer and insured, and is entitled to his share of profits while so insurer and insured.*"

We most strongly urge that this is of particular application to the cases before the Court.

At page 405, the Court said:

"* * * *when it* (the company) *annuls for the future, it must settle fairly for the past. It may dissolve the partnership with some who were members but it is liable for what it owed them at the dissolution.*" (Parentheses ours.)

"*It is the right of all, of each, unless restricted by contract or charter, to cease to insure and thus dissolve the relation; and exercising this right, they for-*

feit no profits previously made, but carry into voluntary retirement their just portion of the profits made while members."

We feel that the logic of this language carries such force that to discuss it further would be superfluous.

Nowhere in the cases at bar does it appear that there were any restrictions or limitations placed upon the participation in profits either in the policy contract or the charter or the statutes of the various states. The only limitation that could be read into the relationship between the parties, if it could be called a limitation, is that during the time that the memberships of the petitioners and others, similarly situated, were in force, it was within the sound discretion of the directors to say how much of the surpluses should be distributed as dividends in any given year and how much retained for the benefit of the petitioners and others similarly situated while their memberships continued in force.

The following statement by the Court, in the same case, is particularly significant, since it involved a company continuing in business.

The Court said at page 407:

"If this corporation were at an end, and all it had were assets for division at its dissolution, it would scarcely be doubted that all those whose monies helped to make the assets should share the profits. *That is this case as to this fund.*"

In the case of *Smith* v. *Hunterdon County Mutual Fire Insurance Company*, 41 N. J. E. 473, the defendant company was organized in 1845 as a mutual company. In 1885 the directors decided that it would be better to reinsure all the risks and make a distribution of the money then in the treasury. A resolution was so adopted, and the Board of Directors ordered a distribution among the

policyholders whose policies were in force at the time of the resolution, and they were to participate in proportion to the amount of policies held at the time of the reinsurance. Plaintiff filed a bill to restrain the directors from making a distribution among the then existing policyholders, contending that to limit such distribution would be inequitable and unjust since many others who were not policyholders at that time had in the past contributed just as much money to the fund. The injunction was ordered to be allowed and all those who had been policyholders since the year 1876, even though they were no longer members of the company, were decreed entitled to participate in the distribution.

In its opinion, the Court said that it is to be remembered that this is a mutual company and not a stock company. The Court distinguished the relationship of policyholders in a mutual company and stockholders in a stock company, and said:

> "I admit the time of dissolution is the time of distribution, but think that while there can be but one time of dissolution for a stock company, *there are as many times for dissolution of a mutual as the recurrence of times for the expiration of policies. In other words, whenever a policy expires, a dissolution is effected as between the rest and the holder of that policy. And at such time he is entitled to his share of the assets, if, under the management during the period he was such policyholder, there be any.*"
>
> "If I take any other view of the case I find myself going against reason and fair dealing, and *taking the money which was given and held in trust for one and giving it to others.*"
>
> "In my judgment, the Court would not be justified in lending its countenance to a principle which would enable stockholders and directors, at a favorable opportunity, to divide amongst themselves the surplus

in the treasury—the cash accumulation of years. *In my judgment, the Court would not be justified in taking the cash payments made by former policyholders and giving them to present policyholders.*"

Clearly, by this decision, although the issue was not presented exactly as it is in our case, the principle involved is almost identical; the logic cannot be controverted and must apply to the case at bar.

(1) Where in a mutual insurance company a surplus has accumulated and has not been distributed before termination of membership, at the termination of membership the retiring members are entitled to distribution of their proportionate shares of the surplus.

In the case of *White* v. *Provident Life Insurance Company*, 237 Pa. 375, a situation existed which was parallel to the case at bar. In the *White* case instead of plaintiffs' policies having been lapsed or cancelled, they had matured so that nothing further was required to be paid by the plaintiff in order for his rights and liabilities to have become fixed, and in order to attain all the rights and benefits to which he was entitled.

The defendant's charter in that case provided that all net profits derived from its life insurance business should be ratably and equitably divided among its policyholders. This incorporated into the charter that which, in equity we have already demonstrated they would have been required to do in any event. In that case, at the maturity of plaintiff's policies, his interest in the surplus amounted to $2250.00, but the defendant arbitrarily offered plaintiff only $640.00, claiming that he was entitled only to such share in the said surplus as the directors should determine in their discretion should be paid to him. The Court there said at page 384:

"In the face of the clear mandate of the law requiring all the net profits to be divided pro rata among the policyholders, we are unable to see how the directors can justify their failure to ascertain and adopt a method which would with at least approximate accuracy distribute the profits equitably and ratably as required by the act of assembly. In *Grange* v. *Insurance Company*, 235 Pa. 320 (330), we said: 'We have no hesitation in saying that whenever a proper case is made out, *a policyholder is entitled to an accounting, and is not to be dismissed with the statement that he is bound by the action of the trustees of the company.*' "

The Court continued on page 385, as follows:

"*However much of it may be retained during the running of the policy, at its maturity the policyholder is entitled to his pro rata share of the fund which has been retained for his benefit. Unless he does thus participate in it, the retaining of the surplus is not only a vain thing, insofar as he is concerned, but it is a detriment in that his so-called annual dividends have been reduced in order to build up a surplus in which he does not share.*"

To concede that members of mutual companies have patiently deferred to the wisdom of their managing directors in withholding part of the surplus accruing each year for the purpose of being used at some future date for the enrichment of some future member who has contributed nothing in return therefor, would be impressing an altruism upon human beings which is beyond all reasonable expectations of them.

Certainly none of the former members of the defendant companies in each of the cases at bar could be said to have intended that they should pay premiums in excess of actual cost of insurance, as they did, for the benefit of others who were, perhaps, not yet born and certainly who were not members of the company during the time that

the membership of the former members were in force. The former members in each of the cases at bar certainly did not intend that by paying excess premiums they were creating a fund in which others who had not yet attained the status of mutuality required by the charter and character of the company, should have bestowed upon them gratuities in the form of interests in surplus to which they had contributed nothing.

H. The proportions of the surplus funds belonging to the retiring members and which were withheld from them without their knowledge or consent constitute a constructive trust.

We believe there is no need to cite cases in support of the principle that the directors, while not standing in the relationship of trustees with respect to the members of mutual insurance companies, nevertheless do stand in a confidential and fiduciary relationship towards them. Considering, then, that upon the termination of membership, the members of mutual insurance companies were entitled to have returned to them their excess premiums over cost of their insurance and their fair proportion of the savings of the business, and considering also the relationship between the members as insurers and considering further that the equitable ownership of the said surpluses was in the members, the question arises by what right does the corporate entity withhold the retiring members' portions of the surpluses which accrued during their memberships?

The theory of a constructive trust is based upon the maxim of equity that:

> "Equity regards as done that which in good conscience ought to be done."

The constructive trust will be impressed whenever necessary to prevent injustice as whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds legal title as against another, provided some confidential relationship exists between the two.

Prosser v. *Finn*, 208 U. S. 67, 52 L. ed. 392.

Motometer etc. v. *National Gauge, etc.*, 31 F. (2nd) 994.

Catherwood v. *Morris*, 345 Ill. 617, and cases cited therein.

So, in the case at bar, a constructive trust must be impressed to prevent an injustice; for excess premiums were charged to the petitioners and those whom they represent which were not returned to them and which in equity and good conscience should have been returned.

In the case of *Catherwood* v. *Morris*, 345 Ill. 617, the Court quoted at length, at page 633, from the case of *Housewright* v. *Steinke*, 326 Ill. 398, as follows:

> "Where two persons stand in such relationship that confidence is necessarily imposed by one in the other and an influence which naturally grows out of that confidence is abused while such confidence continues or an advantage is obtained by reason of such influence over the confiding party, the person seeking such advantage will not be permitted to retain the same, although the transaction could not have been impeached if no such confidential relationship had existed. * * * Courts will indulge in the presumption that all transactions between parties occupying confidential relations to each other by which one obtains an undue advantage of the other are fraudulent. * * * *If a person obtains a legal title to property by virtue of a confidential relation and influence, under such circumstances that ought not, according to rules of equity and good conscience as administered in chan-*

cery, to hold and enjoy the beneficial interest of the property, Courts of Equity, in order to administer complete justice between the parties will raise a trust, by construction, out of such circumstances or relations, and will convert the holder of the legal title into a trustee thereof and order him to execute the trust in such manner as to protect the rights of the defrauded party.''

Applying the foregoing quotation to the case at bar, we have the corporate entities charging a premium known to be in excess of the actual anticipated cost of the insurance, standing in fiduciary relations to their members, under an obligation to return the excess premiums over the actual cost of the insurance and failing so to do. There can be no doubt that fiduciary relationships existed between the parties, that petitioners and those whom they represent relied upon those charged with the duty of returning the excess over cost of insurance to them upon the termination of membership, and that this was sufficient to impress a constructive trust upon those portions of the surpluses wrongfully withheld from the petitioners and those whom they represent.

I. To grant relief to petitioners and those whom they represent, would not interfere with the internal management of Foreign Corporations and would in no way interfere with or involve the exercise, either past or future, of any discretion by their directors.

Apparently the attorneys for all of the defendant companies involved have either wittingly or unwittingly misconstrued the theory of plaintiffs' case and the relief prayed for. Let us reiterate that the plaintiffs, as representatives, do not have, and do not intend that the Court should believe that they have any quarrel with, nor any criticism of, the manner and the amounts of the surpluses that were distributed as dividends during the pe-

riod of petitioners' memberships or during the term of memberships of all former members of the companies whom they represent in these cases; nor do petitioners, as representatives, have any quarrel with, nor criticism of, the discretion vested in and exercised by the directors of the defendant corporations concerning the same while their memberships were so in effect, nor do the petitioners, as representatives, pray nor ask nor intend that this Court should, at this time or at any time, substitute its discretion or judgment for that of the defendants' Boards of Directors. All that petitioners, as representatives, ask is that the proportionate shares of the profits or surpluses, which accrued during the term of memberships of the former members and which were withheld in the discretion of the Board of Directors for their future protection and for the protection of the other members whose policies were in force at the same time, be determined by an accounting and paid to them. Petitioners, as representatives, do ~~not ask~~ for a revision of dividends. They do ask, however, to have returned to the former members, as of the time when their relationships with the companies as members terminated, their portion of the profits or surpluses which accrued during the term of their memberships, and which the companies withheld.

1. Upon termination of membership in a mutual insurance company the rights and liabilities of the members become fixed and cannot involve the exercise of discretion by the directors of the company.

In *Castagnino* v. *Mutual Reserve Fund Life Association*, 157 Fed. 29, the Court held that a suit in equity by a policyholder of a deferred dividend policy for a construction of the policy and the determination of his rights under the charter and by-laws of the company, upon the completion of the deferred dividend period, is not within the rule relative to controversies involving the internal

management of the affairs of a foreign corporation. The same was held in the case of *Townsend* v. *Equitable Life,* 263 Ill. 432.

In the case of *Frick* v. *Hartford Life Insurance Company,* 179 Ia. 149, the plaintiff sought to restrain the defendant from making further illegal assessments on an insurance policy while he was still insured. The Court there held that where there was only a matter of mathematical computation to be considered there is no interference with the internal management of a foreign corporation. The Court approved the case of *Castagnino* v. *Mutual Fund Life Association,* 157 Fed. 29, and the cases cited therein and quoted at length from the *Castagnino* case. The Court also cited with approval the case of *Pierce* v. *Equitable Life,* 145 Mass. 56, and said at page 166:

> "The Court has jurisdiction in matters removed from the ordinary powers or discretion of such directors, and no adequate remedy at law is available."

In the *Castagnino* case, the plaintiff took out a policy with the defendant on a tontine plan and maintained it for the required tontine period. The policy provided that at the end of the said period there should be credited to the policy the equitable portion of the total surplus or reserve fund accumulation.

The defendant company called upon the plaintiff to pay an additional sum of money after the tontine period and plaintiff brought this suit for a construction of his policy and his rights under the charter and by-laws of the defendant. The defendant demurred to the bill on ten grounds. The demurrer was sustained, evidently upon the ground that the Court could not grant the prayer of the bill without interfering with the internal management, administration and control of a foreign corporation and, therefore, had no jurisdiction in the premises.

The Court said, at page 32 *et seq.* in the *Castagnino* case:

> "If the cases cited by the Court below were decided rightly, the demurrer was properly sustained, and the judgment should be affirmed. The present case therefore turns upon the strength of the rule promulgated in those cases. The leading ones, the Clark, from the District of Columbia, the Condon from Maryland, the Taylor from Virginia, and the Howard from North Carolina, were all decided about the same time, in 1899, following the decision in the Clark case. Two other cases, the Gault and the Gaines cases, were decided by the United States District judges in Tennessee, and appeared to have no original force. They simply were all attempts, by suits in equity, to enjoin the collection of illegal assessments, and to recover them back, and relief was denied on the ground that the court of a state other than the state of the insurance company could not exercise jurisdiction to inquire into the internal management and administration of a mutual life insurance company, because that was beyond its reach, and it could not make its order effective in the way of punishing or correcting either the officers of the corporation or the corporation itself, if it should find there had been a dereliction of duty.
>
> "Later than these are the cases of *Strauss*, *Ebert* and *Benjamin*. *Strauss* v. *Mutual Reserve, etc., Ass'n*, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; *Ebert* v. *Mutual Reserve, etc., Ass'n*, 81 Minn. 116, 83 N. W. 506, 84 N. W. 457; and *Benjamin* v. *Mutual Reserve, etc., Ass'n*, 146 Cal. 34, 79 Pac. 517. The *Strauss* and *Ebert* cases were suits to recover damages for the wrongful cancellation of certain policies of this company. The *Benjamin* case was a suit to recover back certain illegal assessments which were made and collected. The cases were not different essentially from that at bar. In each the Court was required to construe the *constitution, by-laws, and policy, the fundamental law of the association*, and determine therefrom whether certain as-

sessments were or were not valid. That is what the plaintiffs below seek, and that is what the Court below held they could not secure, except in New York. Some of the Courts which declined to take jurisdiction seemed alarmed at the possibility of confusion if every State in which the insurance company did business should entertain suits to construe and enforce its policies. It seems to us, however, it would be easier for the far-away litigants to have that matter handled at their homes, rather than take a trip to New York and hire a lawyer there for the same purpose. A citizen who takes a policy in Tennessee in a New York company, after the company had agreed that service of process in Tennessee might be made upon the insurance commissioner of that State, has reason to believe that he or his beneficiaries, if the company fails to treat them rightfully, will have a ready resort to the courts of Tennessee for redress. It is not necessary to take the view that, in order to construe and enforce a policy, there must be an interference with the internal management of the company."

Likewise, it is not necessary to take the view that, in order to construe and enforce the vested rights of past members under the charter contract, there must be an interference with the internal management of the company.

The Court continued:

"The internal management will go on as before, and there will be no interference with the constitution and by-laws or with the lawful authority of the officers of the corporation. In construing a policy, it is not necessary to interfere with the proper discretion of the officers."

So also in construing the rights, under the charter, of past members in surplus which accrued during their memberships it is not necessary to interfere with the proper discretion of the officers.

The Court continued:

> "Where there is discretion, the officers will be allowed full range; it is only where there is no discretion, and the act is clearly unauthorized and wrong, that the law will interfere. In the cases to which we have referred, one in North Carolina, one in Minnesota, and one in California, it was necessary to construe the policy in connection with what the company had done, as shown by the insurance reports of New York. But the matter was entirely simple. There was no attempt to entrench upon the rights or the authority of the officers. * * * *If all this applies to the Courts of the States, much more does it apply to the Courts of the United States.*"

Insofar as the application of this principle is concerned, there is no difference between a suit for an accounting at the end of a deferred dividend period, and one for an accounting at the end of a membership period.

In the case of *Pierce* v. *Equitable*, 145 Mass. 56, the plaintiff filed a bill in equity based upon his tontine policy, claiming his share of the surplus or savings on his policy, and attempting to have the defendant construed as trustee for all of the accumulations under the policy as well as the amount payable by its terms. At the time of the filing of the suit the plaintiff was a resident of New York as was the defendant. The policy provided that, at the expiration of the tontine period, all the surplus or profits derived from such policies on the tontine savings fund assurance plan as should cease to be in force before the completion of their respective tontine dividend periods should be apportioned equally among such policies as should complete their tontine dividend periods. At the end of the tontine period, plaintiff's policy not having terminated, he had an option to withdraw his interest in cash or convert the policy into a paid-up policy for an equivalent amount. The defendant contended that the

plaintiff was bound by the apportionment of the surplus made by its officers in the discharge of their duties unless fraud should be shown.

Regarding this, the Court said, at page 59:

> "We find no words in the policy indicating that the decision of the defendant is to be conclusive; and the words by which the defendant agrees 'equitably' to apportion to the plaintiff's policy its share of the profits bind the defendant to make the apportionment, and imply that, in any proper proceeding, it may be inquired whether it has fulfilled this part of its contract."

And, at page 60, the Court continued:

> ". . . . the defendant was bound to keep accurate accounts of them (sums accruing from the forfeiture of policies), and of all interest and profits thereon, if any. All the facts were entirely within its own knowledge, and it is only thus that it can be determined what equitably should be apportioned to the plaintiff." (Parenthesis ours.)

At page 61, the Court continued:

> "It is contended that the apportionment of the reserve or accumulated profits to be made at the conclusion of the tontine dividend period is but the declaration of a dividend; that the Court will not interfere with the declaration of a dividend, even by a domestic corporation, it being a question solely for its directors or other proper officers, whether any dividend shall be made, and if so, of what amount; and that, until this is made, no stockholder has any rights in any profits that have been made, or assets that might be divided. Conceding this to be the general law, *the amount to be apportioned, or, which the plaintiff is entitled to have apportioned, is not a dividend, in the limited sense in which the word is used in its application to dividends to stockholders.*"

So also, in the cases at bar, the fund sought to be accounted for and distributed is not a dividend in the limited sense in which the word is used in its application to

dividends to stockholders, inasmuch as such distribution was not sought to be made to all members nor in accordance with any provision contained in the policies, but is the excess over the actual cost of the insurance to petitioners and those whom they represent to be returned upon the termination of their memberships.

The question of interference with internal management was discussed at page 63, wherein the Court said:

> "There is no question of its internal economy involved, as where the relations between its members and the corporation are concerned. *If it has adopted any method of conducting its business inconsistent with the due performance of its contract, such a method of administration will not deprive the plaintiff of any rights. It can no more refuse to account than could an individual to whom the plaintiff entrusted his monies on any similar contract.*"

So also, petitioners and all whom they represent, not complaining of the acts of the directors while they were members, could not be deprived of the rights which they acquired under the charter (contract) by virtue of any alleged method of conducting the business by the defendants which would be inconsistent with their due performance thereunder.

The *Pierce* case discussed only the rights of the plaintiff under the policy but did not discuss the rights as an ex-member of a mutual insurance company who did not seek to compel an adjustment of the company's method of administration of the affairs of the company.

On this question of interference with internal management, the case of *Peters* v. *Equitable*, 196 Mass. 143, affirmed the conclusions reached in the *Pierce* case. In that case, the Court said, at page 148:

> "The rest of the defendant's argument is in effect a request for a reconsideration of the decision of the

Court in *Pierce* v. *Equitable Assurance Society.* After careful reconsideration of that decision, in view of the elaborate argument of the defendant's counsel, we are abundantly satisfied with the conclusion there reached and with the reasons there stated."

The case at bar is entirely analogous to the situation described above. The reason for the decisions above is that there is no longer any discretion to be used by the officers or directors, no question as to how much or how little of the surplus should be distributed or retained—likewise in the cases at bar, the rights of the former members in the various undistributed surpluses are not subject to the discretion of the directors insofar as equitable ownership and participation therein are concerned. Their rights having become fixed upon termination of membership, it became a matter for accounting and not for exercise of discretion by the directors.

In the case of *White* v. *Provident Life and Trust Company*, 237 Pa. 375, at page 385, the Court, in considering the question of interference with internal management, stated:

> "*However much of it (surplus) may be retained during the running of the policy, at its maturity the policyholder is entitled to his pro rata share of the fund which has been retained for his benefit. Unless he does thus participate in it, the retaining of the surplus is not only a vain thing, insofar as he is concerned, but it is a detriment in that his so-called annual dividends have been reduced in order to build up a surplus in which he does not share.*" (Parenthesis ours.)

Conceding that the directors of respondent companies had the discretion to retain a portion or all of the surplus accruing during the memberships, at their maturity (termination) the members were entitled to a determination and distribution of their interests in the excess over

cost of insurance while they were members, which were no longer subject to the discretion of the directors.

The question of interference with internal management was also considered in the case of *Carlton* v. *Southern Mutual Insurance Company*, 72 Ga. 371, where the Court said, at page 406:

> "It will be well to add that this opinion does not collide with the general rule that the declaration of dividends is matter much in discretion of the directors of corporate bodies, * * * *this case is without that rule, entirely untouched by it.*"

Petitioners, as representatives, do not ask that the respondents be required to distribute the entire surplus among all policyholders. We must, however, draw a sharp line of demarcation between retaining a sufficient amount of the surplus to insure the future security of members, whose money served to create the surplus, on the one hand, and retaining any amount of the surplus for the future security of those who might become policyholders in the future but who have contributed nothing to the surplus during the membership of the former members, on the other hand.

No other construction can be arrived at than that upon the termination of membership in a mutual insurance company the rights and liabilities of its former members become fixed and do not involve the exercise of discretion by the directors of the company.

J. To grant plaintiffs relief would in no way affect adversely the rights and interests of all the policyholders or members of the defendants.

In the case of *White* v. *Provident Life & Trust Company*, 237 Pa. 375, the contentions set forth by the defendant that the rights of their policyholders and the solvency of the company would be jeopardized if it were re-

quired to distribute its surplus was discussed by the Court at page 381, wherein it said:

> "The surplus is a fund entirely apart from the reserve. The solvency of the company depends upon maintaining the integrity of the reserve fund, but the surplus may be distributed without in any way affecting the ability of the company to meet its obligations upon its policies as they mature."

K. Convenience, efficiency and justice do not require that this Court decline to take jurisdiction of suits of this character.

This topic contained in the motions of the various respondents may well be described as weeping on the shoulder of the Court. The respondents must appreciate the fact that an accounting would not necessitate the moving of their books, records and employees to this jurisdiction.

Concerning this, the Court in the case of *Peters* v. *Equitable Life*, 196 Mass. 143, said that where such a suit is brought by a resident policyholder against a foreign company, the inconvenience to which it will be subjected by reason of the multiplicity of books and the complexity of the accounts involved may not be taken into account by the Court in assuming jurisdiction.

In that case the Court said, at page 150:

> "The *inconveniences* to which the defendant will be subjected by reason of the multiplicity of books and the complexity of the accounts involved *are matters to be considered* in the cases like *Pierce* v. *Equitable Assurance Society* and *National Telephone Manuf. Co.* v. *Du Bois, where the plaintiff is a non-resident. But they are not matters which can be taken into account by the court when the plaintiff is a resident and as such has a standing in the court as matter of right.* • • • "

In the case of *Pierce* v. *Equitable,* 145 Mass. 56, the Court considered the question of convenience, efficiency and justice, and said, at page 62:

> "The defendant is, however, a foreign corporation; and it is urged that this Court ought not to take jurisdiction of the case, if it were possible so to do, and that practically it is impossible for it to effect justice between the parties.
>
> "That it is a matter of grave inconvenience to the defendant to be held to account here, may be conceded. That, if the objection had been promptly taken that the plaintiff was a resident of New York as well as the defendant, it would have received serious consideration, we have here suggested. *Smith* v. *Mutual Insurance Company,* 14 Allen 336. *But we find no inconvenience that is insuperable;* the defendant has an established place of business in this commonwealth, and an agent to receive service of lawful process. It may be presumed that it anticipates that the profits of the business will compensate for the inconvenience of being held to answer, and in a proper case to account in a state other than that to which it owes its corporate existence. It is true that we cannot bring the officers, or the books, or the assets, of this corporation within our jurisdiction, but the corporation is itself lawfully before us. *We shall not assume that it will neglect any order that we may pass.* * * *."

In the cases at bar the charter contract made between the state and the corporate entity for the benefit of all who become members of it, together with the jurisdiction granted by the service of process legally upon the corporate entity in this district and the diversity of citizenship between the petitioners and the respondents, should impel this Court to take the position that the inconveniences, if any, to which respondents might be subjected by reason of the multiplicity of books and the complexity of accounts involved, shall not prevent the Court from taking jurisdiction.

It may also be well to add at this time that at the conclusion of arguments before the Honorable Judge Michael L. Igoe in the District Court when counsel for the respondents asked for a specific ruling upon the questions of jurisdiction, the Court remarked that in his opinion the defendants should not be so concerned with the jurisdiction of the Court as they should with the determination of the merits of the cause. It was thus apparent that Judge Igoe was not greatly impressed with the arguments of counsel on the question of convenience, efficiency and justice.

L. Petitioners' claims are not barred by the Statute of Limitations.

Inasmuch as petitioners base their rights upon the charter which creates the mutual character of the company, the question of the Statute of Limitations becomes unnecessary to argue in its relationship to a written agreement as distinguished from an oral agreement.

The law is well settled that where there is a relationship of a fiduciary nature such as exists between members of the Board of Directors of a corporation toward its stockholders or its members, failure to disclose material facts that are peculiarly within the knowledge of the Board of Directors will prevent the Statute of Limitations from operating as a bar to an action which is based upon facts which create a constructive trust, until such facts become known to those interested. We respectfully urge that the allegations contained in the Second Amended Complaint are sufficient in this regard.

M. Surplus as contingency reserve.

While it is true that the statute of New York and the Statutes of several other states of the respondents grant

permission to create a surplus or a so-called contingency reserve, nevertheless, the respondents must admit that a contingency reserve is not required to be maintained by law. Obviously when the necessity for the maintenance of the contingency reserve ceases under the law as upon the termination of membership, the respondents must distribute so much of it as is no longer necessary to be retained because the contingency has not occurred, or has been precluded.

In the case at bar, inasmuch as the contingencies, for which these so-called contingency reserves or surpluses were withheld, did not occur during the terms of the memberships of the former members, such portions thereof as have not been, and could not be, charged with any liabilities of the former members, likewise constitute excess over the cost of insurance to them and must be returned upon termination of membership.

Typical of the statutes of all the states are Sections 83, 88 and 92 of the New York Insurance Law, which we call to the attention of the Court:

Section 88 states in part:

"The *reserve* on such policy * * *"

shall be a certain amount. This can in no way affect the interest of the former members in the surpluses inasmuch as the surpluses or so-called contingency reserves are entire and separate funds in excess of any and all reserve funds necessary to the solvency of the company. (See the discussion of the case of *White* v. *Provident Life*, page 49 our brief.)

The same section of the New York statute refers to the surrender value of the policy, but nowhere in that section can we find any limitation or forfeiture as to interest or beneficial ownership in the surplus or so-called contingency reserve.

In considering Section 92 of the same statute, it will be well to note that this section of the New York law refers to the policy, and states that payments on the policy will be forfeited and void except as to the rights of a surrender value as provided. This also fails to forfeit or create a forfeiture of interest of former members in surplus.

We have discussed Sections 88 and 92 of the New York Insurance Law to show that they are not applicable to surplus, but refer only to reserves and also that they refer to the policy and not to the membership rights created by virtue of the charter contract.

Section 83 of that statute entitled "Distribution of Surplus to Policyholders" provides in part as follows:

> "Except as herein provided, every domestic life insurance corporation * * * shall provide in every policy * * * that the proportion of the surplus accruing upon said policy shall be ascertained and distributed annually and not otherwise. * * * every such corporation shall well and truly ascertain the surplus earned by such corporation during said year after setting aside from such surplus such sums as may be required for the payment of authorized dividends upon the capital stock, if any, and such sums as may properly be held for account of existing deferred dividend policies, and for a contingency reserve not in excess of the amount prescribed in this article, every such corporation shall apportion the remaining surplus equitably to all other policies entitled to share therein."

This section clearly directed that certain provisions should be printed in every policy issued by a domestic life insurance corporation. It is clear from the language of this section that far from limiting the interests of members in mutual insurance companies, the legislature of that state compelled the domestic insurance corporations to inform the members of part of their rights by

stating the same on the face of the policies. It is also equally clear that the legislature was directing the companies as to the manner and amounts of the surplus to be declared and distributed as dividends. Just as clearly did it also fail, either expressly or by implication, to place a limitation upon or effect a forfeiture of the interest of the members in that part of the surplus which was not directed by the legislature to be distributed as a dividend, but which was authorized to be retained for the future benefit of the then members as a contingency reserve, not to exceed a prescribed amount. Nowhere from the statute can it be inferred that the said contingency reserve or the said undistributed surplus should be or even could be withheld indefinitely, or that the former members should be forever barred from recovery of their interest therein.

Thus we see that the inherent rights of members in mutual insurance companies have not been abrogated by statutory enactment, by constitutional (charter) limitation, or by contractual (policy) forfeiture.

Respectfully submitted,

David H. Caplow and
Sol Andrews,
Counsel for Petitioners.